United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1183

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RONALD WILLIAM HARVEY,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

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Preliminary Statement

On July 10, 1975, a Federal Grand Jury indicted the defendant, Ronald William Harvey, on two counts. The two counts, one alleging violation of 18 U.S.C. § 2113(a) and the other alleging violation of 18 U.S.C. §2113(b), arose out of bank robbery committed on April 22, 1975. On December 17, 1975, a Judgment of Conviction was entered against the defendant after a jury trial held before the Honorable John T. Curtin, United States District Court Judge for the Western District of New York. Judge Curtin sentenced the defendant to six year terms of imprisonment on each count, sentences to be served concurrently. Defendant filed a timely notice of appeal on January 19, 1976.

Question Presented

Whether the Trial Court erroneously prevented the defendant's mother from testifying on the issue of the possible bias of the Government's chief identification witness?

Statement of Facts

The Statement of Facts prepared by the appellant is sufficient with the following additions and exception. Also additions may be specifically noted in the appropriate points in the argument.

The addition to the appellant's Statement of Facts is that the victim teller's only observation of the bank robber was inside the bank. See direct examination of Florida Strictland (Tr. pp. 54-59). Priscilla Martin's only observation of the defendant was outside of the bank (Tr. pp. 94-102). That the two witnesses observed the defendant at different points in time and under different lighting conditions is important when considering the minor discrepancies of the descriptions given by the two witnesses.

The exception taken to appellant's Statement of Facts is that it attributes to Mrs. Martin's description the observation that the person she observed did not have a wig on. Page 3 of Appellant's Statement of Facts. While she stated on cross examination that Mrs. Martin did not know whether or not it was a wig (Tr. pp. 129, 130).

It is also of significance to the issue of identification at the trial that the victim teller gave a description of the robber, (Tr. p. 54), which the jury apparently found fit the defendant. Also there were bank surveillance photos in evidence (Tr. p. 145) which the jury was asked to compare closely with the defendant as he appeared in Court (Tr. p. 179 and p. 180). Therefore, Mrs. Martin's identification was not uncorroborated.

ARGUMENT

A. The Trial Court's exclusion of the testimony of the defendant's mother was a proper ruling under Rule 613(b) of the *Federal Rules of Evidence.*

Rule 613(b) of the *Federal Rules of Evidence* pertains to prior statements of witnesses and provides that:

> "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon..."

The defense, when cross examining Mrs. Martin, inquired as to whether she had ever made a claim that the defendant was the father of one of her children and had abandoned that child (Tr. pp. 140 and 141). The witness was then asked whether she had ever told the defendant's mother that her son had fathered a child that the witness herself bore. The witness' answer was negative (Tr. p. 143). However, the defense *never* directed Mrs. Martin's attention to the time, place, and circumstances of the alleged statement by her. That the attention of the witness was not called to any particular conversation with the mother was cited by Judge Curtin in his decision (Tr. p. 163).

It was established at the trial that the witness, Mrs. Martin, had known the defendant off and on about 19 years, (Tr. p. 94), that he had even lived upstairs from her, (Tr. p. 102), and was also a long-time acquaintance of the defendant's mother, (Tr. p. 152), possibly also for this same nineteen-year period.

That the defense only asked Mrs. Martin whether she had ever stated to the defendant's mother that Ronald was the father of her child was an insufficient foundation on which to allow extrinsic evidence under Rule 613(b). The exact time,

place and circumstances of the alleged statement were not pinpointed sufficiently to give the witness an adequate opportunity to explain or deny tht statement, and, therefore, the defendant's mother's testimony was properly excluded.

B. Admission of extrinsic evidence of a witness' bias is within the discretion of the Trial Court and there was no error in not allowing the defendant's mother to testify.

Extrinsic evidence of a witness' bias is admissible. *United States* v. *Haggett*, 438 F.2d 396 (2nd Cir. 1971), *cert. denied* 402 U.S. 946 (1971); *United States* v. *Battaglia*, 394 F.2d 304 (7th Cir. 1968) *cert. denied* 401 U.S. 924 (1971); *United States* v. *Lester*, 248 F.2d 329 (2nd Cir. 1957). However, an unsubstantiated allegation of a witness' bias does not automatically entitle a party to employ extrinsic evidence to demonstrate the alleged bias. The nature and scope of proof of a witness' bias is up to the Court's discretion. *Nutter* v. *United States*, 412 F.2d 178 (9th Cir. 1969), *cert. denied*, 397 U.S. 927 (1970); *Abeyta* v. *United States*, 368 F.2d 544 (10th Cir. 1966); *United States* v. *Higgens*, 362 F.2d 462 (7th Cir. 1966), *cert. denied*, 385 U.S. 945 (1966).

Judge Curtin based his ruling denying the defendant's mother an opportunity to take the stand on two grounds; Under Rule 613(b) of the *Federal Rules of Evidence* and also on the ground that it was a collateral matter. Although he stated a number of times that it was collateral, (Tr. p. 163), he also addressed the fact that this had to do with a claim of bias on the part of the witness against the defendant (Tr. p. 164).

At that time, the Court indicated that this was not an absolute denial or that such testimony would be inadmissible under all circumstances. The Court indicated that if it were properly developed this evidence could have been admissible when the Judge said, "Something of that serious a nature

should have been here, should have been able to be used today rather than wait for some later time" (Tr. p. 164). And also at Tr. 165, "I'm going to say we should continue now, and I do not think that the record is sufficient to permit this kind of testimony by the mother of the defendant." Therefore, the Judge was indicating that this evidence was not inadmissible under all circumstances only that he was exercising his discretion in not allowing it.

Also, the fact that the defense was allowed to cross examine the witness as to these allegations demonstrates that the Court correctly considered evidence of bias on the part of the witness admissible and that admissibility of the mother's testimony within its discretion.

The Second Circuit in *United States* v. *Haggett, supra,* concluded that while a defendant should be afforded an opportunity to develop evidence of bias–

> ". . . there is no litmus paper test to determine whether extrinsic evidence should be admitted to prove that a witness had a motive to testify falsely as to a particular matter . . ." [399.

In the case at bar, the Trial Court afforded the defense the opportunity to raise the issue of Mrs. Martin's alleged bias during her cross examination. After allowing the defense this opportunity, the Trial Court was no longer confined by any 'litmus paper' test to determine the admissibility of extrinsic evidence of bias.

Under *Haggett,* it is necessary that a proper foundation be laid before extrinsic evidence of bias becomes admissible. Pages 399-400. The Court below specifically found that the proper foundation had not been laid when it said, "The attention of the witness was not called to any conversation with the mother, (Tr. p. 163), and "I do not think that the record is sufficient to permit this kind of testimony by the mother of the defendant" (Tr. p. 165).

Therefore, the Trial Court properly exercised its discretion in disallowing the offered evidence on the ground of a lack of a proper foundation and accordingly there was no error committed below.

In addition to the above, the Trial Court's decision as to the testimony of bias on the part of Mrs. Martin was a proper exercise of discretion under Rule 403 of the *Federal Rules of Evidence* which provides that:

> "Relevant evidence may be excluded if its *probative value* is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added)

The Trial Court had ample reason to conclude that the proposed testimony would have little probative value.

After the conclusion of the Government's case, the Trial Court asked the defense counsel if he had any evidence (Tr. p. 148). Defense counsel replied, "Your Honor, as to what my evidence is or whether I would have any evidence, I really can't tell you right now" (Tr. p. 148). Counsel further admitted that he '. . . didn't know the nature of our proof' when he then sought a continuance (Tr. p. 149). The Trial Court did not allow the continuance.

It should be noted that the first time the defendant and his attorney were aware that Mrs. Martin was a potential witness in this case was when she testified at the Preliminary Hearing in May of 1975 (See Preliminary Hearing Transcript) when both the defendant and his counsel were present. That was approximately seven months before she testified at trial.

After the lunch break, a 'surprise' witness was found by the defense in the person of the defendant's mother (Tr. p. 167). The Trial Court inquired as to when the defense first learned of the alleged accusations by Mrs. Martin against the defen-

dant (Tr. p. 153). The defense counsel responded that immediately preceding Mrs. Martin's testimony, the defendant slipped him a note requesting that he ask Mrs. Martin about her allegations against the defendant (Tr. p. 153). In response, the prosecuting Assistant United States Attorney stated that defense counsel was knowledgeable of the allegations that Mrs. Martin accused the defendant of fathering her child for some time before the trial and this was not denied by the defense (Tr. pp. 154, 156).

The Trial Court indicated that it wanted more than just a note handed over during cross examination by defendant as a basis for allowing the issue of Mrs. Martin's accusations against the defendant to be presented (Tr. p. 154). The Court sought from the defense any information bearing on Mrs. Martin's alleged accusation that the defendant fathered her child. The Court noted some information of hospitalization of Mrs. Martin, date of birth of the child, name of the child, etc. that would support any charge Mrs. Harvey might make should all have been obtained beforehand and been available (Tr. p. 153).

It is clear from the record that the defense was aware of Mrs. Martin's alleged accusations against the defendant, but did not present any evidence that they had occurred other than the mother's testimony. Instead of some independent credible evidence, the defense found a witness to testify against Mrs. Martin with only minutes before the case was to go to the jury.

Evidence developed in such a hap-hazard fashion and from a source whose own bias is in question could easily have been found by the Trial Court to be of very little probative value. Rule 403 specifically authorizes the Trial Court to exclude certain evidence. After balancing the considerable risk of initiating a sub-trial (Tr. p. 156) against the admission of testimony of little probative value, the Trial Court properly exercised its discretion in excluding Mrs. Harvey's testimony.

The appellant has cited three Second Circuit cases as authority in support of its position. However, each of these cases are clearly distinguishable from the case now before the Court.

In *United States* v. *Haggett, supra,* the Court held that there was error to exclude independent evidence that the prosecution witness attempted to suborn perjury. In that case, the defense attempted to call three witnesses who would testify that one of the Government's prosecution witnesses had requested them to perjure themselves against the defendant in return for favorable loan treatment from the Government's witness who was also a bank officer. The defense attempted to call these witnesses only after the witness whose bias was being questioned was asked on cross examination as to whether he had attempted to suborn the perjury of the three witnesses. The Court indicated on page 399 that the proper foundation had to be laid prior to such witnesses being called.

Haggett is distinguishable from this case in that the witnesses sought to be called in *Haggett* would establish that the bank representative there had already *made an attempt* to take some action against the defendant. At best, the only thing the testimony of the defendant's mother could establish in this case is that Mrs. Martin *may have had* a motive to testify falsely, but would not go to establish as in *Haggett* the fact that she was making or had made some "attempt to get even" with the defendant.

In *Haggett,* defense counsel had laid a proper foundation for introducing the extrinsic evidence on cross examination and giving the witness a chance to specifically deny those acts. In the case at bar as was previously noted, a proper foundation was not laid, that defense never asked Mrs. Martin as to the time, circumstances or place of the alleged statement.

In *Haggett*, the defense had three independent witnesses who were developed prior to the trial of that action. In the case at bar, the defense only had the defendant's mother whose testimony was developed after the Government's witness had testified and whose own bias may be questioned.

The appellant cites also *United States* v. *Lester, supra,* that exclusion of extrinsic evidence of a witness' bias is reversible error. That case was reversed because of undue restriction on the right to cross examination of the witness on the issue of bias. There was no such limitation during the cross examination of Mrs. Martin.

Lastly, the appellant cites *United States* v. *Beekman,* 155 F.2d 580 (2nd Cir. 1946) in support of reversal. That case merely holds that records which tend to show bias of a witness cannot be excluded as collateral and, therefore, are *properly subject to subpoena power. Beekman* does not address itself to the admissibility of such records and, therefore, sheds little light on the question now before the Court.

Accordingly, Judge Curtin's decision in excluding the testimony of the defendant's mother was one properly made within his discretion as Trial Judge. Furthermore, that decision is consistent with the law in the Second Circuit.

Conclusion.

The Trial Court's ruling preventing the defendant's mother from testifying was correct under Rule 613(b) of the *Federal Rules of Evidence* and was a proper exercise of judicial discretion under the law existing in the Second Circuit and also under Rule 403 of the *Federal Rules of Evidence*. Therefore, the defendant's conviction should be affirmed in all respects.

Dated: Buffalo, New York, July 27, 1976.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: United States of America
vs
Ronald William Harvey

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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Leslie R. Johnson

Sworn to before me this

28th day of July, 19 76

Patricia A. Lacey

PATRICIA A. LACEY
Notary Public, State of N.Y. Genesee County
My Commission Expires Mar. 30, 19__